

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CALLAWAY GOLF COMPANY,

Plaintiff,

v.

ACUSHNET COMPANY,

Defendant.

C. A. No. 06-91 (SLR)

**PLAINTIFF CALLAWAY GOLF'S MOTION TO FILE A *SUR-REPLY*
IN SUPPORT OF ITS MOTION IN LIMINE NO. 2**

Pursuant to Local Rule 7.1.2(c) and 7.1.3(c)(2), Plaintiff Callaway Golf Co. ("Callaway Golf") respectfully asks that the Court consider the attached short sur-reply on issues that should properly have been raised in Acushnet's opening brief.

Acushnet's opening brief focused on the Hebert patent and the alleged prejudice of that evidence. Acushnet's reply brief now shifts ground in its effort to have the Court alter the balance it carefully struck on the Hebert patent issues during the first trial. Acushnet now asks that it be allowed to introduce the Veneer concept, yet preclude Callaway Golf from any meaningful cross-examination, including preventing any testimony – such as that allowed in the original trial – as to what Acushnet itself thought was novel about that project in the 1990's. Acushnet also argues for the first time that the Veneer concept is not the same as the infringing Pro V1.

Second, Acushnet dedicates an entire section of its reply brief to the alleged importance of a Sullivan United Kingdom patent, a document which received a mere passing reference in Acushnet's opening brief.

Third, Acushnet chooses to raise for the first time in its reply brief an argument that the Court's exclusion of decisions of the Board of Patent Appeals ("BPAI") warrants exclusion of the Veneer evidence.

Finally, as to damages, Acushnet's opening brief admitted the Hebert license was relevant – "Callaway's license to Hebert may be relevant to damages, but that issue is not being tried with liability" – but its reply now argues that the license is an inadmissible settlement agreement. Indeed, Acushnet now advances the novel argument that its expert be allowed to rely on the Hebert patent license, but that Callaway Golf be precluded from introducing that same license or any of the related underlying evidence.

Each of these arguments should have been raised in Acushnet's opening brief in order to give Callaway Golf a meaningful opportunity to respond. Callaway Golf therefore respectfully asks that the Court consider the attached short sur-reply brief to address these four new arguments. Acushnet has been consulted and advises that it opposes the granting of this motion.

Dated: February 16, 2010

FISH & RICHARDSON P.C.

By: /s/ Thomas L. Halkowski

Thomas L. Halkowski (#4099)
222 Delaware Avenue, 17th Floor
P.O. Box 1114
Wilmington, DE 19899-1114
Tel: (302) 652-5070
Fax: (302) 652-0607

**ATTORNEYS FOR PLAINTIFF
CALLAWAY GOLF COMPANY**

CERTIFICATE OF SERVICE

I hereby certify that on February 16, 2010, I electronically filed with the Clerk of Court the attached **PLAINTIFF CALLAWAY GOLF'S MOTION TO FILE A SUR-REPLY TO ACUSHNET'S REPLY BRIEF IN SUPPORT OF ITS MOTION IN LIMINE NO. 2** using CM/ECF which will send electronic notification of such filing(s) to the following Delaware counsel. In addition, the filing was served on the attorneys of record via electronic mail:

Richard L. Horwitz
David E. Moore
Potter Anderson & Corroon LLP
1313 North Market Street, 6th Floor
Hercules Plaza, 6th Floor
P.O. Box 951
Wilmington, DE 19899-0951
rhorwitz@potteranderson.com
dmoore@potteranderson.com

Attorneys for Defendant
ACUSHNET COMPANY

Alan M. Grimaldi
Joseph P. Lavelle
Kenneth Donnelly
Brian A. Rosenthal
Clint Brannon
Howrey LLP - DC
1299 Pennsylvania Avenue, N.W.
Washington, DC 20004
grimaldia@howrey.com
lavellej@howrey.com
donnellyk@howrey.com
rosenthalb@howrey.com
brannonc@howrey.com

/s/ Thomas L. Halkowski
Thomas L. Halkowski